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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 301

PAUL MOSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION AND BRIEF IN SUPPORT

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PETITION AND BRIEF IN SUPPORT

The Petitioner, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit (R. 94) which reversed an order of the District Court (R. 4) admitting petitioner to citizenship.

Opinions Below

The Court of Appeals opinion is reported in 182 F. (2d) 734 and is set forth at page 88 of the Record. The District Court opinion is reported at 85 F. Supp. 683 (R. 80).

Jurisdiction

The judgment of the Court of Appeals was entered on June 14, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the Treaty of Friendship and Commerce between the United States and the Swiss Confederation concluded November 25, 1850 exempting the nationals of each country residing in the other from personal military service granted unqualified relief from such military service without the penalty of permanent ineligibility for American citizenship.

2. Whether the provisions of the Selective Training and Service Act of 1940 (50 Appendix U. S. C. 303a) authorizing neutral aliens to claim exemption under the Act upon condition that such exemption claim shall operate as a bar to American citizenship superseded or modified the aforesaid treaty.

3. Whether an exemption claim by a neutral Swiss alien asserted under the aforesaid treaty and not under the Selective Training and Service Act incurs the citizenship ban of the Selective Training and Service Act which by its express terms was applicable only to those "relieved from liability for training and service under this act."

4. Whether or not the petitioner, in claiming the aforesaid exemption, is debarred from citizenship as a matter of law, where the exemption was not obtained by him as a neutral alien, in the manner prescribed in the Selective Service Regulations, but rather was obtained for him as a Treaty alien pursuant to the Swiss Treaty of 1850, in accordance with a special procedure agreed upon between

our own State Department, the Selective Service System and the Swiss Legation.

5. Whether in any event, on the facts here shown, the Government is estopped from enforcing the provisions of 50 U. S. C. App. 303a in this instance, particularly when it expressly revised the application for exemption (Form 301) and relieved petitioner from formally and affirmatively acknowledging, in writing, that he understood his application would bar him from citizenship.

6. Whether the citizenship ban of the Selective Training and Service Act of 1940 expired when the applicable provision of the said Act (50 Appendix U. S. C. 303a) were no longer operative.

Statutes and Treaties

Article II of the Convention of Friendship, Commerce, Extradition, etc., between the United States of America and the Swiss Confederation, concluded November 25, 1850, and proclaimed November 9, 1855, reads as follows: (11 Stat. 587; Malloy's Treaties and Conventions Vol. 2, p. 1763).

"Article II

> The citizens of one of the two countries, residing or established in the other, shall be free from personal military service; but they shall be liable to the pecuniary or material contributions which may be required by way of compensation, from citizens of the country where they reside, who are exempt from the said service."

Section 303(a) of Title 50, Appendix, United States Code, pertaining to exemption of neutral aliens from military service, reads in part as follows:

> "Persons liable for training and service; number; term; status after completion of term; pay; allowances; and benefits; place of employment

(a) Except as otherwise provided in this Act, every male citizen of the United States, and every other male person residing in the United States, who is between the ages of nineteen and forty-five, at the time fixed for his registration, or who attains the age of nineteen after having been required to register pursuant to section 2 of this Act, shall be liable for training and service in the land or naval forces of the United States; Provided, That any citizen or subject of a neutral country shall be relieved from liability for training and service under this Act if, prior to his induction into the land or naval forces, he has made application to be relieved from such liability in the manner prescribed by and in accordance with rules and regulations prescribed by the President, but any person who makes such application shall thereafter be debarred from becoming a citizen of the United States: . . ."

Section 316(a) and (b) of Title 50, Appendix, United States Code, relating to the suspension of laws conflicting with the Selective Training and Service Act of 1940, and the expiration of the Act reads as follows:

"Suspension of conflicting laws; expiration of Act; appropriations.

(a) Except as provided in this Act, all laws and parts of laws in conflict with the provisions of this Act are hereby suspended to the extent of such conflict for the period in which this Act shall be in force.

(b) The provisions of the third sentence of section 3(a) of this Act (section 303(a) of this Appendix), shall become inoperative and cease to apply at 12 o'clock post-meridian on July 1, 1947. All of the other provisions of this Act (sections 301-303, 304, 305, 306-309, 310, and 311-318 of this Appendix), except the provisions of section 3(b), 3(c), 3(d), 8, and 16(b) (sections 303(b), 303(c), 303(d), 308, and 316(b) of this Appendix), and the fourth and fifth provisos of the second sentence of section 3(a) (Section 303(a) of this Ap-

pendix), shall become inoperative and cease to apply at 12 o'clock post-meridian on March 31, 1947, or on such earlier date as may be specified in a concurrent resolution of the two Houses of Congress for that purpose, except as to offenses committed prior to such date." . . .

Statement

On November 25, 1850 the United States and Switzerland executed a Treaty granting the nationals of each country unqualified exemption from military service (11 Stat. 587). Article 94 of the Swiss Military Penal Code provides that Swiss citizens who enter a foreign army are liable to criminal penalties.[1] The Selective Training and Service Act of 1940 as amended (50 U. S. C. App. 303a) granted exemption under the Act from military service to nationals of neutral countries but such exemption claim operates as a bar to American citizenship [50 U. S. C. App. 303(a)].

On June 5, 1942, the Legation of Switzerland addressed a formal complaint to the Secretary of State (Appendix A, herein) asserting that the Selective Service Act of 1940 was "not reconcilable with the Treaty of 1850". It was alleged:

> "The enactment of this new law is evidently a departure of the United States from the general rule to conscribe for military service only 'citizens of the respective country' and does not seem to be in harmony with the international usage, according to which no neutral shall be compelled to serve in the armed forces of a belligerent country. The Swiss Government

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[1] Article 94 of the Swiss Military Criminal Code of June 13, 1927 (Nouveau Manuel du droit Suisse, 2 vols., Zurich, 1946-47, vol. 2, p. 632) reads:

> "Any citizen who, without the permission of the Federal Council enters foreign military service shall be punished by imprisonment."

(See also: *House Report 1991*, 81st Congress).

The records of our State Department will show that one, Peter Good (Gut) was recently sent to prison by the Government of Switzerland because he served in the United States Armed Forces during the War.

esteems, therefore, that the application of the Selective Service and Training Act as amended to Swiss citizens is not reconcilable with the Treaty of 1850.

"It is true that the new Selective Service Law provides for the possibility that a neutral alien may be released from all military obligations if prior to his induction in the armed forces of the United States, he has made application to be relieved from such liability, with the consequence, however, that any person who makes such an application shall thereafter be debarred from becoming a citizen of the United States. This provision, offering a possibility of exemption to a Swiss resident, may in many cases result in a practical solution, but on account of the accompanying consequences it cannot bring the Act in harmony with the Treaty of 1850, which mentions no conditions whatsoever for the exemption from military service. Under the new Act, Swiss citizens would be allowed to enjoy the privileges established by the Treaty solely if they fulfill a material condition not mentioned and not understood in the Treaty."

On July 6, 1942, the Secretary of State (See Appendix B herein) replied:

"In addition to the foregoing I may tell you that it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty and appropriate consideration will be given to any individual requests by Swiss nationals for exemption from military service under either of the conventions referred to above whether such requests be made by the nationals themselves or by you in their behalf."

Thereafter, the Swiss Legation informed its nationals of the procedure to be followed in claiming exemption under the Treaty of 1850 (Appendix C herein), advising them that under the Treaty a claim of draft exemption would not result in a forfeiture of the right to American citizenship (R. pp. 72-73, 76, 81).

In accordance with the procedure agreed upon between the State Department, the Selective Service System and the Swiss Legation, there was made through the State Department, a claim for draft exemption under the Treaty of 1850 for petitioner, a Swiss citizen and army officer, who is married to a native American citizen with whom he has three American-born children (Exhibit 8, 9, 10, pp. 34-39, 12). Petitioner executed a printed form for draft exemption which was specifically revised to omit the language contained in the regular forms with respect to the forfeiture of the right to apply for naturalization (Exhibit 1, R. pp. 16-17; Exhibit 1-A, R. pp. 19-21).

The petitioner believed that he was claiming draft exemption under the Treaty of 1850 and not under the 1940 Selective Service Act (Exhibit 9, R. 36). He testified and the District and Circuit Courts found that he would not have claimed draft exemption if he knew that the United States would not recognize the treaty and if he were to be barred from naturalization (R. 85, 92).

On March 31, 1948 the petitioner applied for naturalization and on July 21, 1949 the District Court for the Eastern District of New York admitted him to citizenship (R. p. 4). In its opinion, 85 F. Supp. 683, the District Court held (R. 85):

> "Nothing could be clearer than the fact that our own State Department recognized the immunity that Moser had under the treaty. Nor could anything be plainer, to me at least, than the fact that Moser never would have signed the revised form DSS 301 if it were to be treated as a waiver of naturalization in the future. And so, assuming that the State Department made an egregious error, concurred in by the Selective Service Bureau and the Swiss Legation, I cannot see how that can be translated into a waiver by Moser of an important privilege, no matter what he signed upon the advice of these responsible agencies. In other words, even if the

Swiss treaty was intended to be broken by those who enacted the Selective Training and Service Act of 1940, I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted."

On appeal, the Circuit Court reversed in an opinion (R. 88) which held (1) that the Selective Service Act of 1940 as amended was not inconsistent with the Treaty of 1850; (2) that if the Act was inconsistent, it superseded the treaty; and (3) that although petitioner attempted to claim exemption under the treaty rather than the statute, and although he waived no treaty rights, his exemption claim barred him from naturalization. The Circuit Court concluded that "this does seem, however, to be an appealing case for legislative action."

Reasons for Granting Certiorari

This case for the first time raises an important question of federal law involving international rights with Switzerland under a treaty concluded in 1850 (11 Stat. 587), the eligibility of several hundred Swiss nationals to naturalization and the construction of the Selective Training and Service Act of 1940 as amended (50 U. S. C. App. 303a). If left undetermined by the Supreme Court, the issues herein presented will recur under the 1948 Act (62 Stat. 605) and future Selective Service Acts. These issues relate to the citizenship eligibility not only of Swiss nationals but also of nationals of Spain (33 Stat. 2105, 2108), Costa Rica (10 Stat. 916, 921), Argentina (10 Stat. 1005, 1009); and Paraguay (12 Stat. 1091) with whom we have treaties containing reciprocal military exemption provisions.

1. Petitioner believes that the Selective Training and Service Act of 1940 was inconsistent with the 1850 Treaty but did not supersede it because Congress did not clearly

intend to annul rights acquired under the Treaty. Th Supreme Court has always been zealous to safeguard treat rights. *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336; 2 *Hyd International Law* 1464 *et seq.* The decision of the Circui Court denies to petitioner the treaty rights he believed h possessed in conformity with the interpretation given th treaty both by the Swiss Legation and the State Depart ment. Because treaty rights are involved herein, affectin a large number of aliens—rights always carefully protecte by the Supreme Court—it is submitted that certiorar shou.d be granted.

2. Petitioner seeks the priceless possession of American citizenship. But it is important not only to petitioner but to the State Department and to the Government of Switzerland to know authoritatively through a decision of the Supreme Court whether nationals of Switzerland may effectively claim draft exemption under the Treaty of 1850 without forfeiture of the right to American citizenship, whether the Selective Training and Service Act of 1940 was inconsistent with the Treaty, and if so whether an exemption claim mistakenly asserted solely under the Treaty incurred the penalty of a bar to naturalization under the statute particularly where our own State Department and Selective Service System shared in that mistake. Finally there is involved herein an issue affecting a large group of aliens—whether the bar to citizenship continued beyond the operation of the applicable provisions of the Selective Training and Service Act of 1940 which expired without any savings clause prior to the filing of petitioner's application for citizenship. Insofar as the Circuit Court opinion ruled that the Selective Service Act of 1940 superseded the Treaty of 1850 it conflicted with the principle enunciated by this Court that an unequivocal Congressional expression to abrogate a treaty must appear before an Act

of Congress will be construed to violate an existing treaty. *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336, *supra*.

The Circuit Court of Appeals reversed the District Court herein and disregarded the contemporaneous construction not only of the State Department but also of the Selective Service System that draft exemption might be claimed solely under the Treaty of 1850. In so doing, the Circuit Court suggested legislative action to resolve the appealing situation presented by petitioner's case. Before resort be had to legislative action, the issues herein presented should be resolved by the Supreme Court.

Historical Background

In 1804 Madison expressed the view that neutral aliens could "never be rightfully forced into military service particularly external service" and that they were protected therefrom by the law of nations (4 *Moore International Law Digest* 52). In 1862, Secretary of State Seward wrote that "there is no principle more distinctly and clearly settled in the law of nations than the rule that resident aliens not naturalized are not liable to perform military service" (4 *Moore, supra*, p. 53). He also asserted "I can hardly suppose that there exists anywhere in the world, the erroneous belief that aliens are liable here to military service" (4 *Moore, supra*, pp. 52-53). Nevertheless, the Civil War Act of March 3, 1863 (12 Stat. 731) subjected to military service "persons of foreign birth who shall have declared on oath their intention to become citizens." Diplomatic protests followed on the ground that compulsory military service of foreign nationals would violate home laws and the law of nations. As a result by proclamation, declarant aliens were given the right to withdraw their declaration but were required to leave the country within sixty-five days (May 8, 1863, 13 Stat. 732). In 1880 when American na-

tionals were impressed into military service by Mexico, Secretary of State Blaine asserted that compulsory draft of neutrals was a violation of international law (4 *Moore, supra*, p. 61). The Act of April 22, 1898 (30 Stat. 361, c. 187) included declarant aliens. On September 26, 1917, Secretary of State Lansing admitted the existence of the principle of international law preventing the compulsory drafting of neutral aliens except if the Nation is called upon to resist an invasion. (Hearings before the House Committee on Military Affairs, 65th Cong., 1st Sess. 1917, pp. 4, 10 (S. J. Res. 84)).

The Selective Service Act as originally enacted during the first World War again included all declarant aliens (Act of May 18, 1917, 40 Stat. 76, sec. 2). "Almost at the very beginning, the neutral nations' diplomatic representatives approached the State Department with numerous requests to relieve their nationals from the operation of the law, and many protests were filed against the induction of individual aliens into the military service, as being in violation of international law and treaty obligations." (Second Report of the Provost Marshal General (1919) p. 98. See also III *Hackworth, Digest of International Law* (1942) 603 *et seq.*). The law was amended to provide for a claim of exemption by declarant aliens upon withdrawal of their declarations of intention which would operate to forever bar them from becoming American citizens (Act of July 9, 1918, 40 Stat. 845, 885).

Several attempts were made in Congress to make the provisions in regard to declarant aliens applicable to non-declarant aliens but none were successful. (See *Tutun* v. *U. S.*, 12 F. (2d) 763, 764 (C. C. A. 1st, 1926)). In 1931 the statute was modified by permitting the naturalization of any neutral alien whose withdrawal of the declaration of intention, application for discharge, and discharge occurred

after November 11, 1918 (46 Stat. 1087). These statutes were repealed by the Nationality Act of 1940 (8 U. S. C. A. 904). It has been held that this repeal operated to restore the right to apply for naturalization to those previously debarred from naturalization as neutral aliens who had claimed exemption during World War I. (*Interpretation 1 of the Immigration Service*, June 5, 1941; *In re Carlson* 730-P 259786 (D. C. Ill. 1942); *Petition of Otness*, 49 F. Supp. 220 (N. D. Calif. 1943); *Contra, In re Urmenta*, 42 F. Supp. 138 (D. C. Wisc. 1941)). On September 16, 1940, when the present Selective Training and Service Act was passed, only declarant aliens were again subjected to induction (54 Stat. 884). On October 11, 1940, Attorney General Jackson ruled that under the Selective Service Act, every alien between 21 and 36 who lives or has a place of residence, temporary or otherwise, was required to register under the Act.[2] Diplomatic protests including those from Switzerland as indicated *supra* were again received based on treaty provisions and principles of international law. (Senate Report 394, 77th Congress, 1st Sess.) As Secretary of State Cordell Hull advised, one country indicated that under its laws its nationals are prohibited from serving in the armies of a foreign state and on numerous occasions in the past the United States had objected to the compulsory military service of its nationals in the armed services of foreign states even in the absence of treaty provisions. (Letter to Senator Reynolds, Chairman Committee on Military affairs, May 23, 1941).

Section 3(a) of the Selective Service Act was thereafter amended on December 20, 1941 (55 Stat. 844) to set forth the provision noted above at p. 3.

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[2] This interpretation has been rejected in *Kristensen* v. *McGrath*, 179 Fed. 2nd 796 (C.C.A. D.C. 1950), certiorari granted May 5, 1950.

In connection with this bar of citizenship contained in our Selective Service Acts, our Government, either by statute or regulation, took great pains to eliminate any possibility of misunderstanding, by requiring, in effect, a voluntary act of citizenship renunciation on the part of the alien claiming exemption. Thus, under the 1917 Act, which applied only to declarants, the overt act of surrendering the declaration of intention, in exchange for the exemption, was required. Under regulations supplementing the 1940 Draft Act, an express waiver in writing was required of every "neutral" alien, as distinguished from a "treaty" alien. The petitioner Moser was deprived of this protection against a misunderstanding when the State Department and the Selective Service System, together with the Swiss Legation, collaborated in order to achieve revision of the application for draft exemption (Form 301) so as to expressly delete therefrom the waiver of citizenship.

I

The Circuit Court Erred in Finding That the Selective Training and Service Act Controlled Petitioner's Status and Did Not Conflict With the Swiss Treaty.

The Swiss Treaty of 1850 granted draft exemption to its nationals without imposing the permanent bar "from becoming a citizen of the United States."

In *Hauenstein* v. *Lynham*, 100 U. S. 483 (1879) the Supreme Court recognized that this treaty was self effectuating and had become the law of the land. The Selective Training and Service Act of 1940 authorized relief from military service under the Act with the proviso that the applicant would incur a forfeiture of the privilege to become an American Citizen. The imposition of this condition from which the beneficiaries of the Treaty were

free, if applied to a Swiss national was inconsistent with the provisions of our 1850 agreement with Switzerland. Obviously, the Selective Service Act added a condition, which did not heretofore exist, to the terms of the Treaty.

It remains to ascertain whether the conditions of the Selective Service Act abrogated the Treaty. The court below assumed that if a conflict existed the Treaty was *pro tanto* superseded.

When the Selective Service Act of 1917 (50 U.S.C.A. 226) containing a similar provision barring neutral aliens from citizenship was enacted, as the Circuit Court noted, "no one apparently thought such a treaty as this would be affected by the law as passed. See 56 Cong. Rec. 8415-19, 8485." When the 1940 Act became law, our State Department officials asserted that "it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty". (Appendix B). Similarly, the Department of Justice ruled that "nationals of Switzerland were and are now entitled to claim exemption from military service on the basis of the Swiss Treaty" (*Matter of Hans Lowe,* A-5878178, July 14, 1947). This administrative construction of the Selective Training and Service Act of 1940 and the Swiss Treaty is entitled to great weight.

Norwegian Nitrogen Co. v. *U. S.*, 228 U. S. 294, 315 (1933);

United States v. *American Trucking Association,* 310 U. S. 534, 549 (1940);

Billings v. *Truesdell,* 321 U. S. 542, 552 (1944).

Thus, insofar as Congress and our administrative officials were concerned, it was not intended to abrogate, modify or suspend the right of Swiss nationals to claim draft

exemption under the 1850 Treaty. Under these circumstances and in the absence of a clear expression by Congress that the Swiss Treaty was to be modified or suspended, it should not be concluded that the Selective Service Act of 1940 although inconsistent, had such effect.

In *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336, it was said:

> "That Act must be construed with the view to preserve treaty rights unless clearly annulled. . . ."

And in 2 *Hyde, International Law*, 1464, *et seq.*:

> "It should be observed that the Supreme Court is wisely reluctant to construe an Act of Congress as in violation of an existing treaty . . . There appears to be no disposition to impute to it a readiness to disregard the terms of the international agreements of the United States."
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> "An intention to violate a treaty or to direct an act which would be a breach of national good faith is not to be imputed to Congress. While Congress has the power to violate treaties, it is obviously not to be assumed that Congress intends to exercise such a power unless its intention is unequivocally expressed." V Hackworth Dig. Sec. 489.

It is therefore submitted (1) that Section 3-a of the Selective Training and Service Act of 1940 if applied to a Swiss national was inconsistent with the Swiss Treaty of 1850 and (2) that the former did not supersede the Treaty because of the lack of an unequivocal expression by Congress to effect such an abrogation. And if the Treaty remained in full force and effect as contended, petitioner could claim exemption under the Treaty without forfeiting the privilege of becoming an American citizen.

II

The Circuit Court Erred in Finding That Petitioner Incurred the Penalty of Permanent Exclusion from American Citizenship under the Selective Training and Service Act of 1940.

(A) *The Selective Service Penalty Was Not Incurred.*

The Selective Training and Service Act of 1940 as amended (50 App. U. S. C. 303a) specifically renders ineligible to naturalization "those relieved from liability under this Act." Accordingly, there is necessarily implicit in the decision below the finding that petitioner obtained exemption under the Selective Training and Service Act of 1940. Nevertheless, the record is clear, that petitioner sought exemption solely under the Swiss Treaty of 1850. (Exhibits 8, 9, 10, pp. 34-39.) Indeed, the court below recognized the procedure which petitioner followed for it stated (R. 92):

> "The appellee, however, attempted to obtain his exemption *not under the above statute* but under the treaty and he did so because he wished to become an American citizen as well as to get exemption. Indeed, we should recognize that his desire to become an American citizen was paramount in his mind, for the court below has found, because it believed appellee when he so testified, that he would not have sought exemption had he known that it would deprive him of naturalization rights." (Italics supplied.)

The Swiss Legation asserted that the Treaty of 1850 granted unconditional draft exemption without the penalty of forfeiture of naturalization (Appendix A) and Treaty rights are to be liberally construed (*Chew Heong* v. *United States*, 112 U. S. 536). The State Department asserted that it was not the intention of the United States to deny any

rights conferred by the Treaty (Appendix B). The Selective Service System recognized petitioner's claim for exemption as a "treaty" alien, rather than a "neutral" alien and expressly revised its form (D. S. S. 301) to effectuate the same. The Circuit Court found no treaty violation in the Selective Service Act of 1940 but nevertheless found that a Swiss alien could not assert draft exemption under the treaty without incurring the penalty of the Selective Service Act. Two situations suggest themselves under the facts here presented:

(a) If the additional penalty provisions of the Selective Training and Service Act did not apply to Swiss nationals because the Treaty remained paramount as contended in Point I, then such nationals might claim exemption solely under the Treaty. By its very language the citizenship bar of the Selective Training and Service Act attached only to those relieved under the Act. If the Treaty continued in force without modification, petitioner was relieved not under the Act but solely under the Treaty. He therefore remained eligible for citizenship and the District Court's decision should be affirmed.

(b) If the penalty provisions of the Selective Training and Service Act applied to Swiss nationals claiming draft exemption under the 1850 Treaty either because (1) the Act was not inconsistent or (2) the Act was inconsistent but superseded the Treaty, then it is clear that petitioner mistakenly attempted to perform an act which was impossible as a matter of law, i.e. to seek draft exemption under the Treaty without incurring the penalty of the Act. And petitioner's mistake was encouraged, known and induced by the Department of State and the Selective Service System. For as the District Court found (R. 85):

> "Nothing could be clearer than the fact that our own State Department recognized the immunity that Moser

had under the treaty. Nor could anything be plainer, to me at least, than the fact that Moser never would have signed revised form D.S.S. 301 if it were to be treated as a waiver of naturalization in the future. And so, assuming that the State Department made an egregious error, concurred in by the Selective Service Bureau and the Swiss Legation, I cannot see how that can be translated into a waiver by Moser of an important privilege, no matter what he signed upon the advice of these responsible agencies. In other words, even if the Swiss Treaty was intended to be broken by those who enacted the Selective Training and Service Act of 1940 I find as a fact that there never was a waiver of naturalization by Moser and that the petition should be granted."

Petitioner's request to his draft board was for "unconditional relief" from military service in conformity with the Treaty and with reference to the Secretary of State's note of July 6, 1942 (R. 36-38, Appendix B). It was so recognized by the Selective Service System. This was, as the District and Circuit Court found, a request to be relieved solely under the Treaty. (R. 85, 92.) Petitioner therefore sought specifically not to be relieved under the Selective Training and Service Act. But, according to the Circuit Court the very relief under the Act which he disclaimed, was accorded to him.

The general rules of law and statutory construction should be applied herein. The strict letter of the statute must yield to avoid captious interpretations, *Delgadillo* v. *Carmichael*, 332 U. S. 388 (1947), and to avoid injustice. *Church of the Holy Trinity* v. *U. S.*, 143 U. S. 457 (1891). Where as here a penalty is imposed, the statute should be liberally construed to avoid the imposition of the penalty. *Fong Haw Tan* v. *Phelan*, 333 U. S. 6 (1948). An exemption claim filed as here under a mistake known to, shared and induced by the Department of State and the Selective

Service System—agencies upon whom one would naturally rely for advice upon treaty rights and draft exemption claims—should not carry with it the penalty of exclusion from American citizenship.

Mistake may be asserted in transactions between individuals and the government. *Williams* v. *United States*, 138 U. S. 514, 517 (1890). Mistake is a well known legal concept which justifies relief in contracts (V *Williston and Thompson on Contracts*, p. 4399), real estate transactions (*Williams* v. *U. S., Supra*) wills (3 *Pomeroy Equity Jurisprudence*, 1941, p. 405) and in the law of marriage and divorce (3 *Nelson, Divorce and Annulment*, 1945, p. 316). That mistake may avoid a claim of draft exemption as in the case of one unable to read English has been recognized by the Department of Justice (*Matter of Lope Hormazabel* A 5725997. See also: *Neutral Alien Who Claimed Exemption from Military Service, Monthly Review, Immigration Service*, November 1947, pp. 56, 59).

It is true that normally mistake of law will not permit the avoidance of an obligation. But where as here, the mistake of law was induced and shared by one to whom the mistaken party would normally look to for guidance as to the law, the courts will grant relief.

Thus, in *Staten Island Hygenia Ice and Cold Storage Co.* v. *U. S.*, 85 F. (2d) 68 (C. C. A. 2, 1936) it was held that a cause of action for rescission of a tax compromise was stated where it was alleged that a mistake of law was induced by a United States tax collector. The court said at page 71:

> "Between private parties it seems to be well established that equitable relief may be had where a mistake as to the plaintiff's legal rights is induced by misrepresentations, even though innocently made, if it is reasonable for the plaintiff to rely upon the presumably greater knowledge of the defendant . . .

It should make no difference that the United States is the party against whom rescission is sought."

See also: V *Williston and Thompson, supra*, p. 4439.

Here, petitioner acted upon the advice extended to him by our State Department through the Swiss Legation that his treaty rights remained in full force. He was thereby led to believe that he could claim exemption under the treaty and not incur the Selective Service Act penalty. His claim for draft exemption was for unconditional release in conformity with the treaty. His mistake—if the Circuit Court's conclusion be accepted that draft exemption could not be claimed unconditionally, *i. e.*, without the citizenship bar—was one known and induced by our government. If petitioner's draft exemption claim as asserted without a bar to citizenship was impossible as a matter of law, the request should not have been accepted in part but should have been rejected. And the petitioner should have been informed that the only way he could achieve exemption was by signing the regular exemption Form 301, containing the express waiver of citizenship. The petitioner would thus have had the power of election either to waive citizenship or serve in the Armed Forces. Now, to place him in the same position as if he had signed the regular waiver of citizenship would be highly inequitable. The mistake of petitioner in filing such a claim and the mistake of the government in honoring the claim should be relieved as a matter of equity. Under these circumstances a penalty of a permanent bar to citizenship should not be imposed and the District Court's conclusion should be affirmed.

(B) *The Selective Service Penalty Is No Longer Operative.*

By virtue of Section 16 of the Selective Service Act (P.L. 473, approved June 29, 1948), Section 3(a) of the Selective Training and Service Act of 1940 became inopera-

tive on March 31, 1947. The Immigration Service realized that a serious question was thus raised as to whether the naturalization bar remained. It consulted the Assistant Solicitor General who ruled on August 13, 1947, that:

> "An alien who obtained an exemption from military service under this section was assumed to have rendered himself ineligible for naturalization until such time as the courts have passed upon the question." *Monthly Review, Immigration and Naturalization Service,* November, 1945, p. 56, Note 1.

Repeal of the naturalization bar after World War I operated to restore the right to apply for naturalization to those previously barred from naturalization as neutral aliens.

Interpretation 1 of the Immigration Service, June 5, 1941
In re Carlson, 730-P 2 59687 (D. C. Ill. 1942)
Petition of Otness, 49 F. Supp. 220 (N. D. Calif. 1943)
Contra: In re Urmenta, 42 F. Supp. 138 (D.C. Wisc. 1941).

It is a commonplace of Anglo-American law that repeal of a statute eradicates it altogether, and the situation is as if it had never existed. 59 *Corpus Juris* 1189, 1190. Expiration of a statute is in this respect the same as repeal.

U. S. v. *Boisdore,* 8 How. 113;
The Irresistible, 7 Wheat. 551.

Congress, in terminating the Selective Training and Service Act of 1940 was explicit and specific. It directed that the entire Act, with exceptions not here pertinent "*shall become inoperative and cease to apply*" at 12 o'clock noon on March 31, 1947, "except as to offenses committed prior to such Act." (Section 316, 50 U.S.C. App., enacted June 29,

1946). Thus there can be no dispute but that Section 3(a) of the Act died on March 31, 1947, without exceptions or savings clause.

In addition, the termination provisions themselves are expressly preserved, including the phrase "offenses committed prior to such date" (March 31, 1947). This clearly refers only to prosecutions under Section 11.

It seems clear that Congress intended thereby to terminate *all* of the provisions of this section, including those creating the disability for United States citizenship.

It is an elementary canon of statutory construction that the grant of one express power or function is also necessarily the implicit exclusion of all others. *"Expressio unius est exclusio alterius."*

Express enumeration, therefore, of the exceptions and preserved functions contained in Section 16 of the Act, terminating all functions except those enumerated, must necessarily be construed to mean that the citizenship disability created by Section 3(a) was not intended to be preserved.

At common law, the unqualified repeal or termination of a statute, without a saving clause, destroyed all rights and liabilities dependent upon it.

United States v. *Reisinger*, 128 U. S. 398;
Duke Power Co. v. *S. C. Tax Comm.* (C. C. A. 4, 1936), 81 F. (2d) 513, Cert. Denied 298 U. S. 669.

Statutes which have been enacted in derogation of the common law to prevent criminal prosecutions under the dying statute from being terminated, and to continue in existence criminal penalties, criminal liabilities and criminal forfeitures imposed under the erstwhile statute (*United States* v. *Reisinger, supra*), have been strictly construed [*U. S.* v. *Hark*, 320 U. S. 531 (1944).] To date, there has been no judicial extension of their doctrine to situations involving the political status and citizenship rights of individuals.

In *Ewell* v. *Daggs*, 108 U. S. 143, the Supreme Court held that after the repeal of a usury statute, a usurious rate of interest, forfeited under the statute while in force, was reinstated, the interest was payable, and no forfeiture could be enforced. For the life of the statute, the interest rate on the contract constituted a basis for forfeiture of the entire amount of the interest. At the statute's death, the disability fell.

A ruling contrary to the position taken here, rendered in *Benzian* v. *Godwin*, 168 F. (2d) 952 (C. C. A. 2, 1958; cert. denied 335 U. S. 886) can not be regarded as a precedent. As the Solicitor General's memorandum in the Supreme Court will disclose (No. 317, Oct. Term, 1948) the cause was rendered moot prior to decision in the District Court. The *Benzian* opinion is therefore not persuasive as a precedent. *Leader* v. *Apex Hosiery*, 108 F. (2d) 71, 81, affirmed, 310 U. S. 469.

The passage of Section 3(a) of the Selective Service Act created a new class of aliens ineligible for naturalization—*i.e.*, those neutral aliens who claimed draft exemption. But the termination of the Selective Service Act, without a saving clause expressly preserving that ineligibility, dissolved the newly-created class of ineligibles. The Act created a bar to citizenship, but removed the bar upon its own termination.

Conclusion

We believe that the decision of the Circuit Court reversing the District Court was erroneous and that for the reasons set forth herein, this petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

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Washington 4, D. C.

MORRIS E. VOGEL,
Of Counsel.

APPENDIX A

Legation of Switzerland
Washington, D. C.

ad N.2.5.

June 5, 1942.

The Honorable Cordell Hull, Secretary of State, Washington, D. C.

SIR:

On November 25, 1850, the United States and Switzerland concluded a Treaty of Friendship and Commerce which ever since has governed the establishment and the treatment of citizens of the two countries living in the other. In Article II of this Treaty, the contracting parties agreed that "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service."

Animated by the desire of regulating the military obligation of certain individuals possessing both the American and the Swiss nationality, the two Governments complemented the aforementioned Treaty with the signing on November 11, 1937, of a Convention, concerning the military obligations of certain persons having dual nationality. According to this convention, a person born in the territory of one of the two Parties, of parents of the other, who possesses the nationality of the two countries and has his habitual residence in the State of his birth, shall not be held liable by the other State for military service in case of a temporary stay in the territory of the latter.

By signing the Treaty of 1850, and the Convention of 1937, the Governments of the United States and of Switzerland have recognized the existence in their respective territories of colonies of nationals of the other Party, and they have allowed them to maintain all lawful ties with the homeland. These nationals who have retained their original citizenship, and who by *not* applying for naturalization have clearly demonstrated their intention of remaining citizens of their Mother country, should,

therefore, not only by generally recognized International Law, but also by Treaty, be exempt from any personal military service in the armed forces of the country of their residence.

Switzerland's policy has always been in complete agreement with said principle and the treaties. Although since 1850, the Swiss Government has been forced on several occasions by international circumstances to call up for total military mobilization the full man-power of the country, representing one eighth of the entire population, no American citizen had ever been enrolled for military service during these emergencies. This was in strict observance of the military exemption clause of the Treaty of 1850, and in recognition of the rights and duties of neutral persons under International Law.

With the Act of December 20, 1941, to amend the Selective Training and Service Act of 1940, by providing for an extension of liability for military service, the Selective Service has been empowered to enforce liability for military service upon any alien of a certain age who is a resident of the United States, irrespectively of the fact whether or not he has declared his intention to become an American citizen. The new Act provides that every male person residing in the United States between the ages of 20 and 45 shall be liable for training and service in the land and naval forces of the United States.

The enactment of this new law is evidently a departure of the United States from the general rule to conscribe for military service only "citizens of the respective country" and does not seem to be in harmony with the international usage, according to which no neutral shall be compelled to serve in the armed forces of a belligerent country. The Swiss Government esteems, therefore, that the application of the Selective Service and Training Act as amended to Swiss citizens is not reconcilable with the Treaty of 1850.

It is true that the new Selective Service Law provides for the possibility that a neutral alien may be released from all military obligations if prior to his induction in the armed forces of the United States, he has made application to be relieved from such liability, with the consequence,

however, that any person who makes such an application shall thereafter be debarred from becoming a citizen of the United States. This provision, offering a possibility of exemption to a Swiss resident, may in many cases result in a practical solution, but on account of the accompanying consequences it cannot bring the Act in harmony with the Treaty of 1850, which mentions no conditions whatsoever for the exemption from military service. Under the new Act, Swiss citizens would be allowed to enjoy the privileges established by the Treaty solely if they fulfill a material condition not mentioned and not understood in the Treaty.

The text of the Treaty of 1850 furthermore makes no discrimination between persons residing temporarily in the territory of the other party and those who are established permanently there. By inserting the military clause, the two contracting parties had the intention to exempt all their nationals from service in the armed forces of the other party. Under the terms of the Selective Training and Service Act of 1940, as amended, however, only those Swiss citizens who have been declared as "non-resident" in the United States have an opportunity to be unconditionally relieved from military service, while all those considered as residing permanently in the United States could not be exempt without at the same time being debarred from becoming an American citizen. This procedure would indeed place Swiss nationals in a less favorable position than even enemy aliens in the United States, who, if considered by the military authorities as not acceptable for military service or upon their own request, can be exempt from military duties without any further consequences.

I further beg to bring to your attention the situation of a number of Swiss citizens who were inducted into the American Army before the regulations providing for an exemption from service have been in force. Inasmuch as the new Act provides a possibility for exemption only if application is made prior to induction, these Swiss citizens do not have an opportunity to be relieved from military service. They are put in an extremely precarious situation as the Swiss military penal code of June 13, 1927, prohibits

under severe penalties any Swiss citizen to enter the armed forces of a foreign country.

In the light of the foregoing, conscription of Swiss citizens in the United States who have not declared their intention of becoming American citizens, contradicts the text and the spirit of the Treaty of 1850, as well as the principles governing the rights and duties of neutrals under international law.

I have been, therefore, instructed by my Government to approach your Excellency and to request from you to intervene with the appropriate authorities, in order that at least the Swiss citizens who have not declared their intention to become American citizens may be unconditionally exempted from the liability for military service.

Accept, Sir, the assurances of my highest consideration.

(Sig.) C. BRUGGMANN.

R/H.

APPENDIX B

SIR:

I have the honor to refer to your note ad N.2.5. of June 5, 1942 concerning the liability of Swiss nationals for military service in the United States.

The note calls attention to Article II of the Convention of Friendship, Commerce and Extradition between the United States and Switzerland, concluded on November 25, 1850, under which "the citizens of one of the two countries, residing or established in the other, shall be free from personal military service", and to the Convention Regulating Military Obligations of Certain Persons Having Dual Nationality signed at Bern on November 11, 1937; and the view is expressed that under these conventions Swiss nationals in the United States are unconditionally relieved from military service.

I have taken note of your objection to the provisions of the Selective Service Act regarding the right of neutral aliens to obtain exemption by forfeiting their right thereafter to become American citizens.

All male persons within certain specified ages "residing in the United States", unless otherwise exempted, are required by Section 2 of the Selective Training and Service Act of 1940 to register and are made liable for military service by Section 3(a) of the Act:

Swiss nationals temporarily in the United States are not considered to be "residing in the United States" within the meaning of that term as used in the Selective Training and Service Act of 1940 and therefore are not required to register or to render military service under that Act. It is, however, incumbent upon those persons whose departure from the United States is to take place more than three months after their entry to make application within such period of three months to the Local Draft Board in the place in which they are staying for a determination of their residence status. When such determination establishes that they are here temporarily, they are issued a certificate of non-residence which, during the period of its validity, exempts them from registration and military service. Such certificates are renewable upon application. Swiss nationals temporarily in the United States who have registered for military service in error may have such registration canceled by following the procedure for determination of residence.

In addition to the foregoing I may tell you that it is not the intention of this Government to deny to Swiss nationals any right or privilege conferred on them by treaty and appropriate consideration will be given to any individual requests by Swiss nationals for exemption from military service under either of the conventions referred to above whether such requests be made by the nationals themselves or by you in their behalf.

Accept, Sir, the renewed assurances of my highest consideration.

For the Secretary of State:

July 6, 1942.

A. A. Berle, Jr.

APPENDIX C

In a letter dated Nov. 18, 1949, the Swiss Legation, writing to Hans Thummel, one of its Nationals, sets forth some of the facts which explain why it advised its subjects to execute DSS Form 301, revised, as follows:

"The Legation had the opportunity to discuss with the competent United States authorities the various problems pertaining to the procedure to be followed by Swiss nationals in obtaining exemption from military service in this country. It was the purpose of these exchanges of views to ascertain whether the existing procedure could be modified, in order to bring it in complete harmony with the text and intent of article 2 of the Treaty . . . The Legation always maintained the point of view that the exemption of Swiss nationals from military service in the United States, pursuant to the provisions of the treaty, be unconditional, i. e. that the Swiss citizens shall be allowed to enjoy the privileges established by the Treaty without being compelled to fulfill material conditions not covered by the Treaty. Therefore, the Legation considered the requirement of signing a 'waiver of the right to apply for naturalization' when applying for exemption from military service, as a condition contrary to the Treaty of 1850.

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"However, the Department of State assured the Swiss Government that it is not the intention of the United States Government to deny to Swiss nationals any rights or privileges conferred on them by Treaty.

"In lengthy conversations the Legation, the State Department and the Selective Service System endeavored to work out a procedure for the exemption of non-declarant Swiss nationals which would be in conformity with the laws and the provisions of the Treaty of 1850. Finally, the following procedure to be followed by Swiss in obtaining exemption was established:

1. The Legation formally requested the exemption . . . The individual requests made by the Legation

on behalf of Swiss nationals was based on article 2 of the Treaty of 1850.

2. The text of Form DSS-301 was expressly modified and was understood not to contain any waiver of the right to apply for naturalization . . .

3. The State Department was of the opinion that the applicant by filing the revised DSS Form 301 did neither waive nor forfeit his rights to apply for naturalization . . ."

(9755)